89-1629

No. 90-

In The

Supreme Court of the United States

October Term, 1989

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?

2. Whether a federal court violates the constitutionally mandated rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), when it disregards relevant holdings of the state's highest court and other available sources of state law and creates a novel rule of state law?

3. Whether a federal court should certify a question involving the complex relationship between a college and a student to the state's highest court, when the state's highest court has not yet had an opportunity to rule directly on the issue, prior to independently creating a novel rule of state law?

4. Whether a federal court can refuse to instruct a jury as to the binding effect of facts stipulated by the parties to be true, and whether the court thereafter may permit the jury to draw factual conclusions which are incompatible with the facts as stipulated?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 890 F.2d 484 and is reprinted in the Appendix hereto. The opinion of the district court denying petitioner's motion for a directed verdict is also reprinted in the Appendix. Finally, the opinion of the district court granting summary judgment in favor of the petitioner on five of the eight counts of respondent's complaint is reported at 649 F. Supp. 391 and is reprinted in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. A timely Motion for Rehearing with Suggestion for Rehearing *En Banc* was denied on January 16, 1990, and this Petition for Writ of Certiorari was timely filed. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Salve Regina College ("Salve Regina") is a catholic co-educational college of arts and sciences sponsored by the Sisters of Mercy. It is located in Newport, Rhode Island and maintains a department of nursing which awards graduates a bachelor of science in nursing degree.

2. Respondent, Sharon Russell, a citizen of Hartford, Connecticut, entered Salve Regina as a freshman in the fall of 1982. Toward the end of Russell's freshman year at Salve Regina, she sought admission to candidacy in the nursing department (161a - 171a; PE16).[1] She began her nursing studies as a sophomore in the fall of 1983.

3. On the first day of her sophomore year, Russell was advised of the nursing faculty's expectations of students (535a - 536a). At this time, Russell suffered from a serious addictive eating disorder resulting in her being extremely overweight. Russell was approximately 200

[1] References in the Statement are to the Joint Appendix, Plaintiff's Exhibits ("PE"), and Defendant's Exhibits ("DE") in the record on appeal.

pounds overweight – a medical condition known as morbid obesity (298a; 415a; 485a). Persons with morbid obesity are at significant medical risk because of their overweightness (479a).

4. On her first day as a nursing student, Russell's advisor had a private meeting with Russell at which time Russell's obesity was discussed. The advisor discussed some of the requirements of the program and the need for Russell to lose weight. The advisor told Russell she was concerned about Russell's obesity, both for Russell's personal health and its likely impact upon Russell's ability to perform as a professional nurse (305a; 538a).

5. The sophomore year nursing curriculum at Salve Regina consists primarily of academic courses – in contrast to clinical training which forms a major part of the junior and senior year nursing curriculum. Russell performed satisfactorily in her academic work. Nevertheless, Russell's obesity started to interfere with her nursing training and performance during the sophomore year. For example, Russell was unable to satisfactorily complete a course in cardiopulmonary resuscitation offered at Salve Regina (191a; 316a), after she fell on the training mannequin's head and required the instructor's assistance to raise herself (PE29; 1205a). Additionally, it was determined that Russell had significantly understated her weight on a health data form used for making clinical training assignments for her junior year. At that time, Russell promised the college's Clinical Agency Coordinator, the person in charge of assigning nursing students to clinical agencies, that she would try to lose weight before entering the clinical program (316a; 723a). Russell also signed a form in which she agreed, among other things,

to "accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not [Russell] can function in the clinical area" (196a - 197a; PE26).

6. Salve Regina's junior year nursing curriculum included a four credit nursing theory course and a four credit clinical training experience. Unfortunately, instead of losing weight as she had promised, Russell had gained weight before starting her clinical training (321a). As the year progressed, the senior of Russell's two clinical instructors came to believe that Russell's obesity was interfering with her nursing practice and training (471a). Initially, Russell could not fit into the scrub gowns provided by the hospital in which she was training (322a), thus precluding Russell from obtaining experience in the operating room (583a). In her instructor's judgment, Russell had difficulty internalizing and integrating concepts regarding nutrition and obesity and applying these concepts to her assigned patients (573a; 584a).

7. At the end of the fall semester of Russell's junior year, Russell was given a final clinical evaluation by the senior instructor (PE37). In that evaluation, Russell received six unsatisfactory grades and was told that, in the instructor's view, Russell's professional performance was unsatisfactory (231a; 594a-595a). The deficiencies noted by the instructor were all, in some respect, related to Russell's morbid obesity.

8. Salve Regina's Department of Nursing had in effect a policy that even a single unsatisfactory grade in the clinical setting would result in a failing grade in that course, leading to dismissal from the nursing program

(651a). In this case, however, the faculty was ambivalent about summarily dismissing Russell because all of Russell's deficiencies were related to her obesity (593a; 652a). Russell's clinical instructor discussed the grade and available options with the department chairperson and indicated that she was willing to give Russell a passing grade if Russell would commit to losing weight.[2]

9. On December 18, 1984, a meeting took place between Russell, the clinical instructor and the department chairperson wherein an agreement was reached under which Russell would be given a passing grade in the clinical course she had completed – thus avoiding expulsion from the nursing program – conditioned upon Russell entering a treatment program (Weight Watchers), achieving a weight loss of 2 pounds per week, and reporting her progress to the Clinical Agency Coordinator on a weekly basis (232a; 625a). A written contract was prepared which established the conditions for Russell's continuation in the nursing program. The agreement provided, in part:

> I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the nursing program at Salve Regina College thus making me ineligible for Nursing 411.[3]

(PE38, 1237a).

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[2] Russell consistently maintained that her obesity had no physiological basis and was within her power to change (362a). She also insisted that her obesity was not a handicap (362a). In the view of the clinical instructor, Russell's weight loss would likely improve the behaviors which concerned her (627a).

[3] The course referred to in the contract, Nursing 411, is the clinical training component required to be taken during the

(Continued on following page)

10. Russell executed the written contract (233a; 350a). Russell understood that if she could lose two pounds per week consistently, and otherwise meet the academic requirements, she would be allowed to continue in the program (341a). Russell also understood that she had committed herself to withdraw voluntarily from the nursing program if she did not meet the contractual commitment (708a).

11. As a result of entering into the contract, Russell was allowed to continue in the nursing program on a probationary status (674a; 729a). Upon entering into the contract, Russell began a weight treatment program, reported as required, and experienced a fluctuating weight loss which did not average two pounds per week (240a). After May, 1985, Russell failed to report regularly as she had agreed and, unfortunately, began once again to gain weight. In July, 1985, Russell was advised that the department was disappointed in her progress and that Russell had not fulfilled the terms of the contract (260a - 261a). Russell was told that she probably would not be permitted to enroll in Nursing 411 (761a).

12. Russell's net weight loss over the six month period after entering the contract was 10 pounds. Russell also had failed to report weekly to the Clinical Agency

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senior year and is a prerequisite for graduating from Salve Regina with a degree in nursing. Russell's eligibility for the theory portion of the senior year curriculum, Nursing 410, was not affected by the contract (658a).

Coordinator as she had promised. As a result, Russell was advised on August 21, 1985 that she had not complied with the conditions for entering Nursing 411 and that her name was being removed from the list of students eligible to enroll for that course (372a - 373a).

13. Notwithstanding the department's action, Russell was still enrolled as a student at Salve Regina and could have qualified to graduate although Russell could not have graduated as a nurse within the normal four year time frame (795a; 764a). To have graduated from Salve Regina as a nurse, Russell would have had to establish her eligibility for entering Nursing 411, successfully complete Nursing 411, and complete the other requirements for the degree (795a).

14. Instead of filing a grievance, seeking reinstatement to the nursing department, or changing majors (661a), Russell transferred to St. Joseph's College in Connecticut (267a). Russell had to repeat her junior year at St. Joseph's College (268a) due to that institution's requirement that students earn at least 60 credits in residence before graduating with a nursing degree (437a). One year after undergoing radical surgery which reduced her overweightness by 50%, Russell successfully completed her bachelor's degree in nursing at St. Joseph's (156a).

15. This litigation was commenced by Russell in September, 1985 against Salve Regina and five individually named faculty members. The complaint alleged handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the denial of due process and unconstitutional interference with Russell's liberty and property interests, negligent and intentional infliction of

emotional distress, invasion of privacy, wrongful dismissal, violation of implied covenants of good faith and fair dealing, and breach of contract (4a - 16a).

16. On November 17, 1986, the district court entered summary judgment in favor of defendants with respect to all of the claims save those involving intentional infliction of emotional distress, invasion of privacy, and breach of contract. 649 F. Supp. 391. Since all the claims based upon federal law were dismissed, federal jurisdiction over the remaining claims was premised solely upon diversity of citizenship, 28 U.S.C. § 1332(a)(1).

17. Pursuant to the district court's pre-trial order, the parties filed a joint statement which included 40 separate stipulations of fact agreed to by the parties (73a - 85a).

18. At the close of respondent's case-in-chief, the district court directed a verdict in favor of all the individual defendants on all of the claims against them, and directed a verdict in favor of Salve Regina on the claims of intentional infliction of emotional distress and invasion of privacy (517a - 524a). The district court ruled, however, that there was a triable issue with respect to breach of contract. Although the district court rejected Russell's claims that the weight loss contract was procured by duress and lacked consideration, and held that the special agreement which established the conditions for Russell's eligibility in the nursing program was part of the overall relationship between Russell and Salve Regina (522a - 523a), the district court nevertheless stated:

> The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, toward a degree (521a).

The district court continued:

> In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff in August of 1985 by Mrs. Chapdelaine, was reasonable and justified in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance. . . . If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under the side agreement, then the jury can determine that the college justifiably dismissed her from the program (523a).

19. At the close of all of the evidence, Salve Regina renewed its motion for a directed verdict on the grounds, *inter alia*, that the plaintiff had admitted – as evidenced by the stipulated facts – that she had not met – nor came close to meeting – the conditions established for her continuance in the nursing program and that, as a result, Salve Regina College was entitled to judgment as a matter of law. The college also urged that the "substantial performance" test was not applicable under Rhode Island law, or the law of any other state, in the unique context of the college-student relationship (814a - 817a). The district judge, while acknowledging that the Rhode Island Supreme Court had to date limited the application of the "substantial performance" test to construction contracts,

and while agreeing that the doctrine of substantial performance should not apply generally in the academic context, nonetheless ruled that he believed that the Rhode Island Supreme Court would apply the doctrine in this case. No analysis or legal rationale for this prediction was given (820a - 822a). The court denied the motion for a directed verdict and sent the case to the jury (820a - 822a). The college seasonably objected to the charge (904a - 905a).

20. The jury returned a verdict finding the college liable in damages for breach of contract (915a). The district court denied the college's post-trial motions for judgment notwithstanding the verdict, for a new trial, and/or remittitur (132a), after which the clerk entered judgment.

21. The court of appeals affirmed without engaging in any meaningful review of the case. Acknowledging that Rhode Island law applied to all substantive aspects of the case, the court of appeals characterized the case as one of "first impression" and noted that the district court believed that the Rhode Island Supreme Court would apply the substantial performance standard to the contractual relationship between a student and a college. Based upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state, the court of appeals held that the district court's determination was not "reversible error.". 890 F.2d at 489. The court of appeals also rejected petitioner's other grounds for appeal, considering it "appropriate to accord the district court reasonable leeway." 890 F.2d at 490.

SUMMARY

This case presents an opportunity for this Court to determine a number of important and potentially far-reaching issues – including fundamental questions of the allocation of power between the federal and state judiciaries which have not been addressed by this Court in some time. The district court below deemed itself free to declare and apply its own opinion of how the Rhode Island Supreme Court would view the complex relationship between a student and a college. Through the simple expedient of characterizing the case as one of first impression, the district court created a novel and highly troubling rule of state law while ignoring relevant decisions of the Rhode Island Supreme Court, clear legal precedent from other states following a similar doctrinal approach as the Rhode Island Supreme Court, and the reasoned views of legal commentators. Although the district court dressed up its decision as a prediction of what the Rhode Island Supreme Court would likely hold if the case were before it, no rationale nor legal analysis accompanied the prediction. Except for the district judge's subjective feelings and belief, his creation of new law for Rhode Island was totally without foundation. The district court felt that the lack of a precise precedent gave it leeway to create a new rule in the guise of a prediction.

Since this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the Constitution mandates the application of state rather than federal decisional law in diversity cases. In instances where the state's highest court has made a recent ruling in an "all-fours" factual situation, the federal courts have had little

difficulty in applying the *Erie* rule. A problem of ascertaining state law arises however, when the state's highest court has not spoken, either recently or at all, on the question in issue. A more serious problem arises, however, when a federal judge wishes to make an independent decision and reads recent, analogous cases narrowly in order to arrive at the conclusion that the highest court has not spoken authoritatively on the question presented. The question then becomes whether the federal judge may make an independent decision on the basis of what he deems to be the right rule, or whether he must analyze other sources of state law in order to ascertain what the law of the state would be if the issue were before the state's highest court.

This Court has yet to express a definite opinion as to the process which binds a federal judge in ascertaining state law when the highest state court has not spoken to the precise question in issue. This is an important issue which goes to the heart of our federal system of government and one which should be settled by this Court.

A second important issue raised by this petition which has never been directly answered by this Court is the problem of which court within the federal judicial system is charged with the ultimate responsibility for ascertaining what state law is. While the ultimate power to decide whether state law was properly applied in a diversity case undoubtedly rests with the Supreme Court, this Court has indicated its reliance on lower federal courts for the interpretation of state law.

But which of the lower courts? In the First Circuit, it is the district court's construction of state law that now applies. In this case, for example, the court of appeals refused to review the district judge's prediction of state law, deferring to the district court's presumed expertise in the law of the state of Rhode Island. Thus, despite Salve Regina's statutory if not constitutional right to at least one appeal, that right became largely meaningless because the district court's interpretation of state law – even if incorrect – was not viewed as reversible error. Other circuits, most notably the Third, Sixth, Seventh, Ninth, and Tenth Circuits, take a wholly different approach. In those circuits, rather than the deferential standard of review to a district judge's construction of the law of the state, which accepts that construction unless it is clearly wrong, questions of state law are reviewed by the court of appeals under the same independent *de novo* standard as are questions of federal law. Those circuits properly recognize that anything less than a full independent *de novo* review is an abdication of appellate responsibility and a deprivation of a party's right to a full, considered and impartial review of the district court's decision. This Court should resolve this conflict in the circuits, and clearly establish that the courts of appeal have the responsibility for ascertaining state law and that a *de novo* standard for reviewing district courts' pronouncements of state law is mandated.

Another important issue raised by this petition is the desirability of a federal court's refraining from the exercise of jurisdiction in those diversity cases where it finds itself unable to ascertain accurately the law of the state involved. Although this Court ruled in *Meredith v. Winter*

Haven, 320 U.S. 328 (1943), that federal courts should accept the responsibility to decide questions of state law when necessary for the disposition of cases brought to it for decision, subsequent experience with federal district judges exercising a quasi-legislative function in the development of state law raises the question of whether principles of federalism require reconsideration of the question of abstention, or at least mandatory certification to the state's highest court for guidance, whenever state law is unclear.

Finally, this case raises an important question of federal procedure. For reasons known only to the district court, the district judge refused petitioner's request to read the stipulated facts to the jury and to instruct the jury that they must treat the stipulated facts as having been proved and accept them as true (113a - 114a). The law appears to be clear that stipulations or admissions made pursuant to a pre-trial order are the equivalent of proof and prevent an independent examination by the jury with respect to the matters stipulated. Had the jury been required to accept the stipulated facts as conclusive, it could not have concluded, as it apparently did, that respondent substantially performed her obligations to the college. Although this issue was fully briefed and argued to the Court of Appeals, it was never decided. The case should be remanded to the Court of Appeals for decision on this issue.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A PARTY IS ENTITLED TO A DE NOVO REVIEW OF A DISTRICT COURT'S DETERMINATION OF STATE LAW.

The court of appeals did not engage in any meaningful review of the district court's prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in meeting the requirements for continuing or completing an academic program is sufficient.[4] The First Circuit failed to review the decision because it applies a deferential standard of review to a district judge's construction of the law of the state in which he or she sits, accepting that construction unless it is "clearly wrong." *Dennis v. Rhode Island Hospital Trust National Bank*, 744 F.2d 893, 896 (1st Cir. 1984); *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982).[5] Thus, the First Circuit equates a district court's determination of state law with determinations of

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[4] Despite exhaustive research, the college has found no other case in the academic or educational context in which the commercial contract doctrine of "substantial performance" has been applied. To the contrary, the only courts that appear to have considered the application of such a doctrine have rejected it. *Slaughter v. Brigham Young University*, 514 F.2d 622, 627 (10th Cir. 1975); *Clayton v. Trustees of Princeton University*, 608 F. Supp. 413 (D.N.J. 1985).

[5] Other circuits have similarly applied this limited standard of review. *See, e.g., Mitchell v. Random House, Inc.*, 865 F.2d 664 (5th Cir. 1989); *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64 (8th Cir. 1988).

fact under Rule 52(a) of the Federal Rules of Civil Procedure. The "clearly erroneous" standard of Rule 52, however, is based upon the trial judge's unique opportunity to judge the accuracy of witnesses' recollections and make credibility determinations – factors that are not relevant to a conclusion of law – be it federal or state.

In contrast, the Court of Appeals of the Third, Sixth, Seventh, Ninth and Tenth Circuits take a wholly different approach. In the leading case of *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984), an *en banc* United States Court of Appeals for the Ninth Circuit concluded that district court determinations of state law pursuant to the *Erie* doctrine are subject to *de novo* review in the same manner as any other question of law. In that case, the Ninth Circuit held that anything less than full independent *de novo* review of state law determinations by district courts amount to an abdication of appellate responsibility. Observing that every party is entitled to a "full, considered, and impartial review of the decision of the district court," the court ruled that there is no justification for being less thorough, or for curtailing the parties' appellate rights, simply because the law involved is state law. 739 F.2d at 1398. According to the Ninth Circuit, there is no sound reason to have a lesser appellate duty to make a correct independent determination when the question is one of state law. 739 F.2d at 1398.

The Ninth Circuit's rule of *de novo* review has now been followed in a number of other jurisdictions. *See, e.g., Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914, 929 (6th Cir. 1988) (it would be an abdication of appellate responsibility to give less than *de novo* review); *Craig v. Lake Asbestos of Quebec. Ltd.*, 843 F.2d 145, 148 (3rd Cir. 1988) (district court's determinations of state law subject to plenary review); *Beard v. J.I. Case Co.,*. 823 F.2d 1095, 1098 (7th Cir. 1987); *Afram Export Corporation v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370 (7th Cir. 1985).

The question of the standard of review to be given to state law determinations by federal courts is an issue that ought to be decided by this Court. Our jurisprudence has developed a thesis that a person is entitled as a right to one appeal; this thesis is at least statutory if not constitutional in origin. *Cf.* 28 U.S.C. § 1291; *Griffin v. Illinois*, 351 U.S. 12 (1956). Since this Court's energies must be husbanded for resolution of issues of greater public importance than determinations of state law questions, it is obvious that the only chance for appellate review will be to a court of appeals. When a court of appeals exercises its mandatory appellate jurisdiction by giving full and independent review to the decision of the district court, this Court then becomes free to conserve its discretionary powers because the parties have already been accorded full appellate review.

Moreover, it would appear that the policies which are basic to the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), mandate full appellate review by the court of appeals. In *Erie*, this Court ruled that equal justice required, to the extent possible, application of the same law to all persons regardless of their citizenship, and neutralization of the advantage of forum shopping. 304 U.S. at 74-78. The petitioner before the Court did not choose the federal forum; it was brought to the federal forum merely by accident of respondent's domicile. Had the case been tried before a Rhode Island trial court, the parties would have been accorded full appellate review by the Rhode

Island Supreme Court – the state's highest judicial authority. In contrast, the federal district court in this case acted as a substitute for the entire state court system. The petitioner was not only foreclosed from a definitive ruling on state law; it was foreclosed from any meaningful judicial review of the district court's speculation as to state law.

The First Circuit's deference to the district court is based solely upon the latter's purported expert knowledge of the law of the state in which it is located. While it is true that a district judge may be an expert in determining and applying state law, a district judge is no less an expert in determining and applying federal law. There is simply no sound reason for according greater weight to the former than to the latter and for maintaining different standards of appellate review. Given that appellate judges are not encumbered, as are trial judges, by the process of hearing evidence, they are more free to concentrate on legal questions – federal and state. If anything, the collaborative, deliberative process of appellate courts probably puts them in a better position than the district courts to decide questions of law.

II. IMPORTANT ISSUES OF FEDERALISM REQUIRE THAT THIS COURT ARTICULATE AND DEFINE THE STANDARDS TO BE USED IN ASCERTAINING STATE LAW.

This Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), taught that the federal courts exercising diversity of citizenship jurisdiction must apply state rather than federal decisional law. In so doing, the decision raised the question of how a federal judge is to ascertain

and apply state decisional law. As Mr. Justice Frankfurter noted in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198 (1956), the *Erie* rule makes a choice between two evils:

> One of the difficulties, of course, resulting from *Erie R.R. Co. v. Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights.

350 U.S. at 208-09.

The *Erie* opinion itself shed little light on the problem of ascertaining unclear state law; nevertheless, in analyzing the proper role of the federal judge with respect to state law, *Erie* provides the policies and ground rules from which standards of judicial conduct must be devised. In those few instances where a state's highest court has made a ruling directly on point, there is little difficulty in applying the *Erie* rule. There is no doubt that a federal judge is bound by the decision of an intermediate state court of state-wide jurisdiction, absent a ruling by the highest court of the state or other convincing evidence of state law. *Fidelity Union Trust Company v. Field*, 311 U.S. 169 (1940). Moreover, it is clear that a federal judge must ascertain and apply state law regardless of his or her personal belief as to its correctness. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940). Finally, it is clear that state law arises from many sources, and a federal judge must be cognizant of all such sources in

making his or her determination. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956).

What is not clear, however, are the standards for analysis that a judge must utilize to ascertain state law when an authoritative state court has not spoken to the precise question in issue – and what restrictions constrain a federal judge who wishes to create new state law and thus reads closely analogous cases narrowly in order to arrive at the conclusion that the matter is one of first impression. These issues are presented in the instant petition.

In this case, the district judge ruled that he was satisfied in his "own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case" (821a).[6] This conclusion was not based upon recognized sources

[6] The doctrine of substantial performance is inherently unworkable in the academic context. Imagine, for example, a student who successfully completes 124 out of 128 credits required for graduation. Should a jury be permitted to conclude that the student "substantially performed" the requirements and, thus, is entitled to a degree? Would anyone wish to be treated by a nurse who "substantially performed," but did not fully meet the requirements for graduation? Professional education requires subjective evaluation in non-cognitive areas like clinical performance, and the law must respect a faculties' professional judgment as to the level of performance. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

of state law such as published opinions, relevant statutes, legislative history, treatises, law review articles, or other sources of law which would be examined by the state's highest court. Rather, the determination was based upon some undefined special knowledge or feeling for Rhode Island law that the district judge presumed to have but could not articulate.

Since the very act of a federal judge in deciding a case serves a declaratory function of restating, adding to, or modifying the pre-existing "body of law" of the state, there should be some well-defined standard by which a federal judge acts to predict the way in which the state's highest court would rule. The accuracy of prediction of state court decisions by a federal judge depends upon the judge's ability to emulate the judicial decision-making process of the state court. This, in turn, requires an examination of all sources of state law and methodologies of decision making, in order to isolate those factors peculiar to the particular state's judicial process which materially affect the outcome of litigation within a state. Moreover, the examination must include all available persuasive data including compelling inferences or logical implications from other related adjudications. Anything less would be inconsistent with *Erie* and the principles of federalism upon which *Erie* is based.

The danger inherent in the current lack of standards – the nearly unbridled power of a district court to create state law – is clearly manifested in this case. Even a cursory analysis would demonstrate that the Rhode Island Supreme Court has long limited the application of the doctrine of "substantial performance" to construction contract cases, where it typically arises when a builder

claims from the owner payment of the unpaid balance due under the contract. In such situations, it is well settled in Rhode Island that when a builder has substantially performed, he can recover the contract price less the amount needed by the owner to remedy the defect. *National Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985); *Ferris v. Mann*, 99 R.I. 630, 636, 210 A.2d 121, 124 (1965). The doctrine of substantial performance recognizes that it would be unreasonable to condition a builder's recovery upon strict performance where minor defects or omissions could be remedied by repair. *Id.*

It seems highly unlikely, however, that the Rhode Island Supreme Court would apply the doctrine of substantial performance to a dispute arising out of the relationship between a private college and a student. Rhode Island recognizes that the student-college relationship is unique and cannot be stuffed into one doctrinal category such as contract or associational law. While it is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between a student and a college to provide some framework into which to put the problem, it is clear that commercial contract doctrine is not applied in all its aspects. *See, e.g., Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied* 435 U.S. 971 (1978) (applying Rhode Island law).[7] In Rhode Island, the standard applied to the

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[7] The *Lyons* case is based upon the leading case from the Court of Appeals for the Tenth Circuit, *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), *cert. denied* 423 U.S. 898 (1975). This interpretation of the student-university relationship has been adopted virtually universally since 1975.

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student-college relationship is that of reasonable expectation – what meaning the party making a manifestation should reasonably expect the other party to give it. *Id.* at 202.

Despite this clear authority, the district court chose to reject the college's proffered jury instructions which outlined the "reasonable expectations" standard and instead espoused the prediction that the Rhode Island Supreme Court would apply the commercial contract doctrine of "substantial performance." The district court made this prediction notwithstanding the fact that every reported case in the academic or educational context which has considered the application of the doctrine of substantial performance has rejected it.[8]

The erroneous prediction of state law by the district court in this case – compounded by the court of appeals' deference to the district court on issues of state law – underscores the need for this Court to clarify and restrict a federal court's ability to create state law out of whole cloth. Despite efforts to restrict diversity jurisdiction, diversity cases still comprise a substantial portion of the

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These cases adhere to the principle of avoiding mechanistic applications of contract law and afford institutional academic decision making the utmost latitude and discretion. *See, e.g., Neel v. Indiana University Board of Trustees*, 435 N.E.2d 607 (Ind. Ct. App. 1982); *Sofair v. State University of New York – Upstate Medical Center College of Medicine*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), *reversed on other grounds*, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 (1978); *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).

[8] See note 4, *supra*.

docket of the district courts. In small states such as Rhode Island, where there is only a single state appellate court, it is rare to find an authoritative state decision directly on point. As a result, in Rhode Island at least, the federal district court, as a practical matter, creates as much decisional state law as the state judiciary. At present, simply by characterizing the case as one of first impression, the federal court has virtual *carte blanche* to act as a quasi state legislature in creating new law. This state of affairs simply cannot be countenanced under the *Erie* doctrine's declaration that the federal courts lack constitutional authority to create substantive law to be applied within the states. This Court should issue its Writ of Certiorari to establish the standards to be adhered to by district courts in ascertaining state law.

III. THE FEDERAL COURT SHOULD HAVE CERTIFIED THE QUESTION TO THE RHODE ISLAND SUPREME COURT.

Until such time as Congress sees fit to abolish diversity jurisdiction, this Court should consider the desirability of the lower federal courts abstaining from the exercise of jurisdiction in those cases, such as the case at bar, where the district court believes the matter is one of first impression in the state. This simple expedient would eliminate the federal courts' unwarranted intrusion into the development of state law.

Although this Court ruled in *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943), that parties were entitled to have an adjudication of questions of state law in diversity cases, such a rule is not constitutionally or statutorally mandated. This is evidenced by the refusal of the

federal courts to resolve issues of domestic relations and probate matters despite the meeting of jurisdictional requirements. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Petitioner suggests that the Court ought to reconsider its ruling in *Meredith* in the interests of federalism and judicial workload.[9]

Another possibility which would preserve the notions of federalism upon which the *Erie* doctrine is based would be to require federal courts to certify doubtful questions of state law to the state high court for resolution.[10] Through the adoption of this practice, the court best equipped to answer state law questions could do so in a definitive manner, and the equality of treatment which the *Erie* rule was aimed to accomplish would be assured.

This Court should issue its Writ of Certiorari to evaluate these alternatives.

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[9] Justices Black and Jackson dissented from the Court's ruling in *Meredith*. Moreover, Mr. Justice Frankfurter, who joined in Mr. Chief Justice Stone's opinion in that case, later indicated doubts about the result. See Frankfurter, J. in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 53 (1954).

[10] For example, Rule 6 of the Rules of the Supreme Court of the State of Rhode Island authorizes that tribunal to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court if there are involved in any proceeding before it questions of Rhode Island law which may be determinative of the cause then pending in the certifying court, and as to which it appears to the certifying court there is no controlling precedent.

IV. THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS TO DETERMINE WHETHER THE FEDERAL DISTRICT COURT CAN REFUSE TO INSTRUCT A JURY AS TO THE BINDING EFFECT OF STIPULATED FACTS.

Pursuant to the district court's pre-trial order, the parties agreed to 40 separate stipulations of fact (73a - 85a). Salve Regina requested an instruction to the jury that the jury must treat the stipulated facts as having been proved and accept them as true (113a - 114a). The district court failed to give the requested charge over the college's objection (904a).

While not ruled upon by this Court, the law seems clear that stipulations or admissions made pursuant to a pre-trial order are the equivalent of proof and prevent an independent examination by the jury with respect to the matters stipulated. *See, e.g., Burstein v. United States*, 232 F.2d 19, 22-23 (8th Cir. 1956); *Jackson v. United States*, 330 F.2d 679 (8th Cir. 1964), *cert. denied* 379 U.S. 885 (1964); *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965).

It is unclear why the district court refused to instruct the jury that they were bound by the stipulated facts; it proffered no rationale for the action. What is clear, however, is that Salve Regina was prejudiced by the jury's failure to consider the stipulated facts as binding. Had the jury been required to accept the stipulated facts as conclusive, it would have been impossible for the jury to have concluded, as it apparently did, that respondent substantially performed her obligations to the college.

While this issue was fully briefed and argued to the court of appeals, the court of appeals rendered no

decision on this issue. This Court should exercise its supervisory powers and remand this issue to the court of appeals for decision.

CONCLUSION

For the reasons stated, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Sharon L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellants.

Sharon L. RUSSELL,
Plaintiff, Appellant,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellees.

Nos. 89-1564, 89-1597.

United States Court of Appeals,
First Circuit.

Heard Oct. 3, 1989.

Decided Nov. 20, 1989.

Steven E. Snow, with whom Partridge, Snow & Hahn, Providence, R.I., was on brief for Salve Regina College, et als.

Edward T. Hogan, with whom Hogan & Hogan, East Providence, R.I., was on brief for Sharon L. Russell.

Before BOWNES and TORRUELLA, Circuit Judges, and TIMBERS,* Senior Circuit Judge.

TIMBERS, Circuit Judge:

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*Of the Second Circuit, sitting by designation.

This consolidated appeal arises from the stormy relationship between Sharon L. Russell ("Russell") and Salve Regina College of Newport, Rhode Island ("Salve Regina" or "the College"), which Russell attended from 1982 to 1985. The United States District Court for the District of Rhode Island, Ronald R. Lagueux, *District Judge*, entered a directed verdict for Salve Regina on Russell's claims of invasion of privacy and intentional infliction of emotional distress at the close of plaintiff's case-in-chief, but allowed Russell's breach of contract claim to go to the jury.[1] The jury found that Salve Regina had breached its contract with Russell by expelling her. The court entered judgment on the verdict, denying Salve Regina's motions for judgment n.o.v. and for a new trial. The court also denied Salve Regina's motion for remittitur of the damages of $30,513.40 plus interest, a total of $43,903.45, that the jury awarded Russell.

On appeal Russell contends that, because a reasonable jury could have found invasion of privacy and intentional infliction of emotion distress under Rhode Island law, the district court erred in entering a directed verdict

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[1] This action originally was assigned to then-District Judge Bruce M. Selya. Judge Selya granted summary judgment in favor of the individual defendants on all counts and in favor of Salve Regina on five counts of Russell's complaint: due process, handicapped discrimination, negligent infliction of emotional distress, wrongful discharge and breach of convent of good faith. Russell does not raise the granting of summary judgment as to any of these counts on appeal. Judge Selya denied summary judgment on the three claims that are the subject of this appeal. *Russell v. Salve Regina College*, 649 F.Supp. 391 (D.R.I.1986).

on those claims. Salve Regina contends that the judgment that it breached its contract with Russell should be reversed because: (1) the court erred as a matter of law in its analysis of the contract between a student and the college she attended; and (2) even accepting the court's formulation, there was insufficient evidence to support the jury verdict. It also argues that the calculation of damages was incorrect as a matter of law.

For the reasons set forth below, we affirm the judgment of the district court in all respects.

I.

We summarize only facts believed necessary to an understanding of the issues raised on appeal.

By all accounts, Sharon Russell was an extremely overweight young woman. In her application for admission to Salve Regina, Russell stated her weight as 280 pounds. The College apparently did not consider her condition a problem at that time, as it accepted her under an early admissions plan. From the start, Russell made it clear that her goal was admission to the College's Nursing Department.

Russell completed her freshman year without significant incident and was accepted in the College's Nursing Department starting in her sophomore year, 1983-1984. Her trauma started then.[2] The year began on a sour note

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[2] The facts recited here, which relate primarily to the distress and privacy claims that were the subject of the

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when a school administrator told Russell in public that they would have trouble finding a nurse's uniform to fit her. Later, during a class on how to make beds occupied by patients, the instructor had Russell serve as the patient, reasoning aloud that if the students could make a bed occupied by Russell, who weighed over 300 pounds, they would have no problem with real patients. The same instructor used Russell in similar fashion for demonstrations on injections and the taking of blood pressure.

The start of Russell's junior year, 1984-85, coincides with the time school officials began to pressure her directly to lose weight. In the first semester, they tried to get Russell to sign a "contract" stating that she would attend Weight Watchers and to prove it by submitting an attendance record. Russell offered to try to attend weekly, but refused to sign a written promise. Apparently, she did go to Weight Watchers regularly, but did not lose significant weight. One of Russell's clinical instructors gave her a failing grade in the first semester for reasons which, the jury found, were related to her weight rather than her performance.[3]

According to the rules of the Nursing Department, failure in a clinical course generally entailed expulsion from the program. But school officials offered Russell a

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directed verdict, must be viewed in the light most favorable to Russell. *Bennett v. Public Service Co.*, 542 F.2d 92 (1st Cir.1976).

[3] Significantly, Russell's other clinical instructor that semester considered her performance outstanding. In addition, Russell's academic record indicates at least satisfactory performance in all courses except the clinical one that she failed.

deal, whereby she would sign a "contract" similar to the one she rejected earlier, with the additional provision that she needed to lose at least two pounds per week to remain in good standing. The "contract" provided that the penalty for failure would be immediate withdrawal from the program. Confronting the choice of signing the agreement or being expelled, Russell signed.

Russell apparently lived up to the terms of the "contract" during the second semester by attending Weight Watchers weekly and submitting proof of attendance, but she failed to lose two pounds per week steadily. She was nevertheless allowed to complete her junior year. During the following summer, however, Russell did not maintain satisfactory contact with College officials regarding her efforts, nor did she lose any additional weight. She was asked to withdrawal from the nursing program voluntarily and she did so. She transferred to a program at another school.[4] Since that program had a two year residency requirement, Russell had to repeat her junior year, causing her nursing education to run five years rather than the usual four. Russell completed her education successfully in 1987 and is now a registered nurse.

Soon after her departure from Salve Regina, she commenced the instant action which led to this appeal.

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[4] Although the record is unclear, it appears that the College told Russell that she would not be eligible to register for her senior year, but could apply for a change of status if she met the College's conditions. Russell instead chose to transfer. At any rate Salve Regina does not dispute that Russell's departure was not truly "voluntary".

II.

Subject matter jurisdiction over this case is based on diversity of citizenship. 28 U.S.C. § 1332 (1988). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1988). The parties do not dispute that the law of Rhode Island applies to all substantive aspect of the case.

We discuss first in section II of this opinion that two claims with respect to which the district court directed a verdict in favor of the College. Then in section III we discuss the contract claim which was submitted to the jury.

(A) *Intentional Infliction of Emotional Distress*

Rhode Island recognizes this tort theory. It has adopted as its standard § 46 of the Restatement (Second) of Torts (1965). *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I.1984). Section 46 states that:

> "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Restatement (Second) of Torts § 46.[5] Rhode Island has added the requirement of at least some physical manifestation. *Curtis v. State Dep't for Children*, 522 A.2d 203 (R.I.1987). Russell has alleged nausea, vomiting,

[5] Russell does not allege that the administration of Salve Regina intended to harm her, but rather that they hounded her without regard to the consequences.

headaches, etc., resulting from the College's conduct. This appears to create a triable issue on the causation and harm elements of the theory. The issue on appeal, therefore, is whether the conduct alleged is sufficiently extreme and outrageous.

In its arguments that the conduct of its employees does not rise to the necessary threshold, the College in essence concedes a pattern of harassment, but argues that the conduct was merely discourteous and necessary to carry out its academic mission.[6] We have no doubt that the conduct was insensitive, but to be tortious it must be "atrocious, and utterly intolerable in a civilized community." *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1021 (1st Cir.) (construing Rhode Island law and quoting Restatement, *supra*, § 46, comment d), *cert. denied*, 109 S.Ct. 65 (1988). Without regard to context, the College is correct; a series of insults, even if ongoing and systematic, is insufficient. But the context – the relationship of the plaintiff to the defendant and the knowledge of plaintiff's special sensitivities – is a necessary element of the tort. Prosser

[6] Regarding the latter point, the College correctly states that both the Restatement and Rhode Island law may excuse otherwise tortious conduct if taken to protect legitimate interests. *Champlin supra*, 478 A.2d at 988; Restatement, *supra*, § 46, comment g. The example provided is that of a heartless landlord exercising his privilege to evict a destitute family for nonpayment of rent. *Id.*, comment g, illustration 14. It is unable, however, to specify the interest served beyond "educational standards". We are unable to see what interest would be served by the petty, mean-spirited and concerted conduct in question. If anything, the interest of a college faculty and administrators should be the creation of an atmosphere of courtesy and tolerance.

and Keeton, The Law of Torts, § 12, at 64 (5th ed. 1984). The school officials knew very quickly that Russell wanted badly to become a nurse and that she was easily traumatized by comments about her weight; yet they harassed her continuously for almost two years.[7] In this context, comments by school officials about weight were doubly hurtful.

Even considering the context and acknowledging this to be a close question, however, we affirm the district court's directed verdict dismissing the claim. "Extreme and outrageous" is an amorphous standard, which is necessity varies from case to case. The College's conduct may have been unprofessional, but we cannot say that it was so far removed from the bounds of civilization as not to comply with the test set forth in § 46. Russell's commendable resiliency lends support to our conclusion.

(B) *Invasion of Privacy*

In Rhode Island, this tort is purely statutory; so we refer primarily to the statute itself, especially in light of

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[7] Salve Regina claims that an illustration set forth in the Restatement closely parallels this case:

> "A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A."

Restatement, *supra*, § 46, comment f, illustration 13.

In view of the ongoing nature of the conduct in the instant case, as well as the control Salve Regina held over Russell's professional future, the comparison to an isolated remark, even one made with knowledge of special sensitivity, is disingenuous.

the lack of case law interpreting the text. The relevant provision, R.I.Gen.Laws § 9-1-28.1(a)(1) (1985 Reenactment), covers only "*physical* solitude or seclusion" (emphasis added).[8] The conduct at issue here does not fit easily within the scope of that language, since all of it occurred in public. The only area "invaded" was Russell's psyche. We cannot lightly predict that the Rhode Island Supreme Court would interpret the statute contrary to its literal language, in view of the statement of that Court that it will give statutory language its plain meaning absent compelling reasons to the contrary. *Fruit Growers Express Co. v. Norberg*, 471 A.2d 628 (R.I.1984). We therefore affirm the district court's directed verdict on the invasion of the privacy count.

III.

Russell's breach of contract claim is the only one the district court submitted to the jury. The College does not dispute that a student-college relationship is essentially a contractual one. *E.g., Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir.1977), *cert. denied*, 435 U.S. 971 (1978). Rather, it challenges the court's jury charge regarding the terms of the contract and the duties of the parties.

From the various catalogs, manuals, handbooks, etc., that form the contract between student and institution,

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[8] A separate section of Rhode Island's Privacy Law provides the "right to be secure from unreasonable publicity given to one's private life." R.I.Gen.Laws. § 9-1-28.1(a)(3) (1985 Reenactment). Recovery is available, however, only if a private fact is disclosed. The only material fact here, Russell's obesity, of course was quite public.

the district court, in its jury charge, boiled the agreement between the parties down to one in which Russell on the one hand was required to abide by disciplinary rules, pay tuition and maintain good academic standing,[9] and the College on the other hand was required to provide her with an education until graduation. The court informed the jury that the agreement was modified by the "contract" the parties signed during Russell's junior year. The jury was told that, if Russell "substantially performed" her side of the bargain, the College's actions constituted a breach.

The College challenges the court's characterization of the contract. It claims the court ignored relevant provisions of publications from the Nursing Department; for example, those relating to the need for nurses to be models of health for their patients. These provisions, it argues, demonstrate that Russell was aware that success as a nursing student demanded more than competent performance. We hold, however, that the provisions on health speak to the duty of students to inform the Department of hidden health problems that might affect the students or their patients, and they are not a license for administrators to decide late in the game that an obese student is not a positive model of health.[10]

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[9] There is no dispute that Russell met these criteria, with the exception of the clinical course she failed because of her weight.

[10] Judge Selya stated that "[c]ontagion was not legitimately at issue – after all, there is not allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing." *Russell, supra,* 649 F.Supp. at 405.

Salve Regina also challenges the application of strict commercial contract principles, *e.g.*, that, if Russell substantially performed, the College had an absolute duty to educate her.[11] It cites several cases which hold that colleges, in order properly to carry out their functions, must be given more contractual leeway than commercial parties. *E.g., Lyons, supra,* 565 F.2d at 202 (dean may reject faculty recommendation to reinstate student); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975); *Clayton v. Trustees of Princeton Univ.*, 608 F.Supp. 413 (D.N.J.1985) (university must have flexibility to discipline cheating students). There can be no doubt that courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matter of curriculum and discipline. *Slaughter, supra,* 514 F.2d at 627 ("substantial performance" standard is intolerable when it allows student to get away with "a little dishonesty").

The instant case, however, differs in a very significant respect. The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to

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[11] The College also argues that the jury finding of substantial performance is not supported by the record. We hold that the record demonstrates that the finding is not clearly erroneous.

this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard to compel an institution to graduate a student merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action. *Slaughter, supra*, 514 F.2d at 626.

In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir.1984); *O'Rourke v. Eastern Air Lines Inc.*, 730 F.2d 842, 847 (2d Cir.1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error.

IV.

Salve Regina argues that the $25,000 damages awarded to Russell (the equivalent of a year's salary) constitutes legal error.[12] It contends that she is entitled to $2,000, representing her net savings after one year of employment. We disagree.

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[12] The remaining damages, $5,513.40, constitute the costs incurred for Russell's additional year in college.

Since there appears to be no case law on this precise point,[13] we turn to familiar principles of contract law. The purpose of a contract remedy is to place the injured party in as good a position as it would have been in had the breach not occurred. *Rhode Island Turnpike and Bridge Auth. v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344, 357 (1977). Since each case turns on the specific facts at hand, we consider it appropriate to accord the district court reasonable leeway. 5 Corbin on Contracts § 992 (1964 ed.).

Here, the district court's jury charge stated specifically that the proper remedy for the breach in question would be a year's salary. We cannot say that this was incorrect as a matter of law. The contract between Salve Regina and Russell was not motivated by ecomonic concerns, at least on Russell's part; yet its breach clearly damaged Russell. She lost a year of her professional life. Under the circumstances, the salary Russell would have earned in that lost year strikes us as hardly a windfall. Moreover, the most closely analogous cases, involving damages for wrongful employment termination, hold that a plaintiff is entitled to the full salary, less any amount he was under a duty to mitigate. 5 Corbin, *supra*, § 1095 (collecting cases). We therefore affirm the damage award.

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[13] The College's reliance on *Slaughter, supra*, is unavailing. The *Slaughter* court merely held that, because the substantial performance standard was inapplicable on the facts, it was improper to award the plaintiff the amount he would have earned had he received his doctorate earlier. 514 F.2d at 626. We are faced with the reverse situation: substantial performance in fact and proper application of the standard.

V.

To summarize:

We hold that the district court properly granted a directed verdict in favor of Salve Regina on the intentional infliction of emotional distress and invasion of privacy counts. We affirm the judgment in favor of Russell on the breach of contract count. We also affirm the damage award on the contract count.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628 L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE ET AL

Before the Honorable Ronald R. Lagueux
District Judge

THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply. I recognize that the Rhode Island cases on this subject are largely cases involving construction contracts. The very first case that I recall is Pelletier v. Massey, which is in 49 R.I. 408. That was decided in 1928, and in that case, the Supreme Court of Rhode Island pointed out that in the context of a construction contract, that a contractor would be entitled to an installment payment if it had substantially performed the contract, and the Court in that case, especially pointed out that the trial judge had properly charged the jury in accordance with the doctrine of substantial performance, which was an accepted rule. The Court also stated that whether there was

substantial performance or not was a question of fact to be decided by the jury. There is a more recent case, I believe it's the Ferris case, which also comes up in a construction contract milieu.

Now, I have an advantage that the Court of Appeals doesn't have, and that is I was a state trial judge for 18 and 1/2 years, and I have a feel for what the Rhode Island Supreme Court will do or won't do. As a matter of fact, I charged at least two juries on the issue of substantial performance in other than construction contract situations, and I am satisfied in my own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for.

So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury.

The defendant also claims that the plaintiff hasn't proved damages. There is ample evidence in the record from which the jury could determine damages. The measure of damages in this case is a year in the life. That's what the plaintiff was deprived of, a year of her professional life, and therefore, she lost the income she would have made during that year, and she incurred additional expenses for another year of college, because she had to repeat her junior year. So I will charge the jury along that line. And the evidence is quite clear she lost roughly $25,000 in income, because she had to repeat her junior year at St. Joseph's, and she lost whatever it was, $3,000 that she had to pay, extra tuition that she had to pay, and other fees, to get that extra year. In other words, if she had gotten the benefit of her bargain, if the jury finds that the college was in breach of contract, the jury will find that the benefit of her bargain was that she would have had a degree in one more year from Salve Regina in nursing, and wouldn't have had to pay for an extra year of schooling, and would have had one year of income. So there is ample evidence from which the jury can determine damages in this case under the benefit of the bargain rule.

For all those reasons, defendant's motion for directed verdict is denied.

APPENDIX C

Sharon L. RUSSELL, Plaintiff,

v.

SALVE REGINA COLLEGE; Catherine E. Graziano, individually and in her capacity as a faculty member and as Dean of the Salve Regina College nursing department; Joan Chapdelaine, individually and in her capacity as a faculty member and clinical agency coordinator for the nursing department at Salve Regina College; Mary Lavin, individually and in her capacity as a faculty member at Salve Regina College; Maureen Hynes, individually and in her capacity as a faculty member at Salve Regina College; Barbara Dean, individually and in her capacity as a faculty member at Salve Regina College; Joann Mullaney, individually and in her capacity as a faculty member at Salve Regina College; and Sheila Megley, individually and in her capacity as a faculty member at Salve Regina College, Defendants.

Civ. A. No. 85-0628-S.

United States District Court,
D. Rhode Island.

Nov. 17, 1986.

OPINION AND ORDER

SELYA, District Judge.

This case, brought under diversity jurisdiction, 28 U.S.C. § 1332(a),[1] raises a host of intriguing federal and

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[1] Although the plaintiff has premised jurisdiction alternatively on 28 U.S.C. § 1331, her "federal question" claims necessarily march across unsteady ground. *See* Part III, *post*.

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state law questions in an exotic factual context. Briefly put, the plaintiff, Sharon Russell, a citizen and resident of East Hartford, Connecticut, was expelled from Salve Regina College ("Salve" or "College") because of her unwillingness and/or inability to control an extreme chronic weight problem. She now sues for damages. The defendants include the College and some seven Salve officials. The identity of each individual defendant and the relationship of each to the College is recounted with fidelity in the case caption, *see ante*, and it would be pleonastic to restate that data anew. The case turns on the scope of the College's unilateral authority to dismiss a student and on the manner in which the expulsion was effected in this instance.

The plaintiff's amended complaint contains some eight distinct statements of claim. The defendants have moved for summary judgment, Fed.R.Civ.P. 56(c), as to each and all of Russell's initiatives. The matter has been plethorically briefed and vigorously argued. The applicable legal standard is by now firmly embedded in federal jurisprudence; in the interests of expedition, the court merely reiterates what it said at an earlier date in *Gonsalves v. Alpine Country Club*, 563 F.Supp. 1283, 1285 (D.R.I.1983), *aff'd*, 727 F.2d 27 (1st Cir.1984):

> It is well settled that summary judgment can be granted only where there is no genuine issue as to any material fact and where the movant is

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But, inasmuch as Russell, on the one hand, and all of the defendants, on the second hand, are citizens of different states, and more than the requisite minimum amount is arguably in controversy, there is no authentic need to consider the plausibility of federal question jurisdiction.

entitled to judgment as a matter of law. *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 986 (1st Cir.1983); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir.1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); *United Nuclear Corp. v. Cannon*, 553 F.Supp. 1220, 1226 (D.R.I.1982); *Milene Music, Inc. v. Gotauco*, 551 F.Supp. 1288, 1292 (D.R.I.1982). In determining whether these conditions have been met, the Court must view the record in the light most favorable to the party opposing the motion, *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d at 986; *John Sanderson & Co. (WOOL) Pty. Ltd. v. Ludlow Jute Co.*, 569 F.2d 696, 698 (1st Cir.1978), indulging all inferences favorable to that party. *Santoni v. Federal Deposit Insurance Corp.*, 677 F.2d 174, 177 (1st Cir.1982); *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 686 (1st Cir. 1980).

With this preface, the court proceeds to narrate the undisputed facts,[2] to frame the issues more precisely, and to set forth its findings and conclusions.

I. BACKGROUND

Salve is a religiously affiliated college located in Newport, Rhode Island, administered by the Sisters of

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[2] The facts utilized by the court are drawn from the affidavits and documentary proffers of record, and from the parties' statements of material facts not in dispute. *See* D.R.I.L.R. 12.1, the text of which has been quoted in pertinent part in *McInnis v. Harley-Davidson Motor Co., Inc.*, 625 F.Supp. 943, 946-47 n. 2 (D.R.I.1986). As is required at this stage of the proceedings, the court has refrained from making credibility judgments, but has accepted the record at face value, indulging all contradictions and inferences in the perspective most flattering to the plaintiff.

Mercy of the Roman Catholic Church. Russell was admitted to the College by early decision in the winter of 1981-82. She began her studies in September 1982. Russell's interest in a nursing career antedated her matriculation: she had applied only to colleges with nursing programs and had expressed her intention to pursue such a course of study both in her original application to Salve and in her admissions interview. She commenced her academic endeavors at the College with the avowed intention of gaining admittance to Salve's program of nursing education.[3]

During her inaugural year at the College, there is rather fragile evidence that Russell sought some treatment for obesity. At various times during that school year, her 5'6" frame recorded weights between 306 and 315 pounds according to data on file at the College's health services unit. It is plain that, although she achieved no meaningful weight loss during her freshman year, Russell was considerably more successful as a student. Her work in liberal arts courses was adequate and her grades were respectable. Consequently, Russell was admitted to the nursing program, effective at the start of her sophomore year. She was given a copy of the "Nursing Handbook" (Handbook) issued by the College, and clearly understood that the Handbook set out the requirements for successful completion of the degree in nursing.

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[3] Though the record is less than explicit, it appears that Salve requires students to undergo a minimum of one year in a liberal arts curriculum before undertaking a nursing concentration.

The fabric of Russell's aspirations began to unravel in the fall of 1983, when she entered her sophomore year (her first as a nursing student per se). The parties have presented an intricate (and sometimes conflicting) history of the interaction between the plaintiff and her sundry academic supervisors. It would serve no useful purpose at this juncture fully to recapitulate those events, or to attempt to reconcile every conflict. After all, the mechanism of Rule 56 does not require that there be no unresolved questions of fact; it is sufficient if there are no genuine issues remaining as to any *material* facts.

It suffices for the moment to say that there were myriad problems along the way: the agonizing search for uniforms and scrub gowns that would fit a woman of Russell's girth; a tendency on the part of faculty members to employ Russell in order to model hospital procedures incident to the care of obese patients; prolonged lectures and discussions about the desirability of weight loss; and so on and so forth. Indeed, the record reveals a veritable smorgasbord of verbal exchanges characterized by one side as "torment" or "humiliation" and by the other as "expressions of concern" or "forthright statements of school policy." (It takes little imagination to decipher which litigants are wont to apply which epithets to which actions.)

The court recognizes, of course, that sadism and benevolence – like beauty – often reside principally in the eye of the beholder. And, the court has neither the need nor the means to attempt to discern the subjective motives of myriad actors on the cold, fleshless record of a Rule 56 motion. For the purposes at hand, it is enough to acknowledge that an array of such incidents occurred and

that, by the end of her sophomore year, Russell's size had become a matter of concern for all of the parties.

In her junior year, the plaintiff executed a contract (Contract) purporting to make her further participation in the College's nursing curriculum contingent upon an average weight loss of two pounds per week. The Contract was a singular sort of agreement. (It is reproduced in full as an appendix to this opinion.) Notwithstanding the signing of the Contract, Russell proved unable to meet the commitment, or even closely to approach it. Her body weight never fell appreciably below 300 pounds. Though the circumstances are complex, she seems to have made – and invariably to have broken – a series of promises in this regard. Predictably, an escalating level of tension began to characterize dealings between Russell and certain of the individual defendants.

The climax occurred on or about August 23, 1985. The plaintiff received a letter from the coordinator of the nursing program, defendant Chapdelaine, advising that she had been dismissed from the nursing department and from the college. Russell's education was concededly interrupted at that point (though, after a year's hiatus, she resumed her studies in nursing at another institution).

II. STATEMENT OF THE CASE

Russell's complaint, as noted above, contains an octet of claims. Two of these supposed causes of action – Counts VI and VII – allege "federal" claims. Count VI charges the defendants with a denial of due process and an unconstitutional interference with the plaintiff's protectible liberty and property interests. Count VII alleges

handicapped discrimination in derogation of 29 U.S.C. § 794.

The remaining six counts implicate state law, and the parties (who agree on little else) concur that Rhode Island law governs in this diversity case. The state law claims possess a variety of characteristics. Two of these initiatives are contract-based: Count I alleges nonperformance of an agreement to educate and Count II asserts breach of an implied covenant of good faith and fair dealing. Three of the remaining state law initiatives are tort-based: Counts III and VIII posit intentional and negligent infliction of emotional distress, respectively; and Count IV remonstrates against a perceived invasion of Russell's privacy. Count V – which seeks redress for wrongful dismissal – is a contract/tort hybrid.

It is alleged throughout that the plaintiff lost a year of prospective employment in a job which she claims to have been offered contingent upon successful completion of her nursing degree. Russell seeks compensatory damages for this delay and for the physical and emotional trauma which she purportedly suffered as a result of what she views as the callous, humiliating, and wrongful conduct of the several defendants. The plaintiff also prays for exemplary damages, counsel fees, and costs.[4]

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[4] The complaint, though amended as recently as June 1986, continues to pray for unspecified injunctive relief. This prayer seems largely academic at the moment. The plaintiff has pursued her studies elsewhere, *see ante*, and has manifested no enduring desire to obtain reinstatement in Salve's nursing program.

The court will first address the impact of the pending Rule 56 motion on the federal law claims, and will thereafter turn to a consideration of the other (state law) counts.

III. FEDERAL CLAIMS

Both of the claims which arise under federal law founder on essentially the same reefs and shoals: the College is not a "state actor," and its nursing curriculum is not a federally funded "program or activity" within the meaning of the Rehabitation Act of 1973, 29 U.S.C. § 794. The court need not tarry overlong in putting these claims to rest.

A. *Due Process*

With respect to what the plaintiff envisions as an utter disregard for the niceties (or even the basics) of due process, the court has no need to reach the hotly-debated questions of whether Russell enjoyed any constitutionally protected interest, created by the terms of the Handbook or distilled from any other source. The fifth and fourteenth amendments to the Constitution apply only to the federal government and to the state, respectively – and derivatively, to those whose actions can fairly be attributed to federal or state government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Even where an institution admittedly discriminates in its membership policies, there is no deprivation of due process unless the action in question sufficiently implicates the

state so as to make the conduct "state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

To be sure, if the government plays the role of enforcer for privately originated discrimination, then the government may be forbidden to exercise its police power in furtherance of the discriminatory activity. *Shelley v. Kraemer*, 334 U.S. 1, 18-23, 68 S.Ct. 836, 844-47, 92 L.Ed. 1161 (1948). Or when the web of interconnection between the government and private bigotry is spun tightly enough to conclude that the government agency has "insinuated itself into a position of interdependence" with a discriminatory actor, then the challenged conduct must be subjected to fifth or fourteenth amendment scrutiny. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). Those maxims do not, however assist this plaintiff. The requirement of "state action" demands more than some (modest) interplay between the public and private sectors. Justice Rehnquist's caveat in *Moose Lodge, supra*, is particularly relevant here:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and adhered to in subsequent decisions. Our holdings indicate

> that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971.

The First Circuit has given further content to this standard in its decision in *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir.1984). There, the court of appeals held that an accounting firm working under a contract with the state was not sufficiently connected with the government to place its conduct within the "state action" rubric. *Id.* at 77. *McGillicuddy* makes it plain that even a close relationship with government does not suffice, absent some meaningful entanglement, to invoke the rigors of due process.

Under *Moose Lodge* and its progeny, no "state action" can be discerned here. The fact that Salve was the recipient of a (rather meagre) library grant is manifestly insufficient to carry the weight of the assertion. The fact that the College's nursing program is, in certain respects, subject to state agency approval is likewise inadequate. In *Moose Lodge*, the discriminatory actor was licensed by the state, but that was not enough to impress the imprimatur of the state on the private actor's bigotry. *Id.* 407 U.S. at 177, 92 S.Ct. at 1973. The "mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the fourteenth amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73

L.Ed.2d 418 (1982); *Jarrell v. Chemical Dependency Unit of Acadiana*, 791 F.2d 373, 374 (5th Cir.1983). These scraps of evidence, combined, do not turn the state action corner; and the record contains aught else. Though what little has been adduced must be construed in the light most favorable to the plaintiff, it utterly fails to demonstrate the slightest glimmer of the requisite governmental involvement. Accordingly, Count VI cannot stand.

B. *Handicapped Discrimination*

In respect to the plaintiff's statement of claim under the Rehabilitation Act, 29 U.S.C. § 794, the teachings of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), are controlling. In *Grove City*, the Court held that a college which received federal funding only indirectly (that is, through tuition subsidies to students) was not subject in all its departments to the provisions of federal antidiscrimination law. *Id.* at 572, 104 S.Ct. at 1220. A private institution of higher education which, like Salve, receives federal monies exclusively through its students, is subject to federal antidiscrimination laws only with respect to its financial aid program. *Id.* at 574, 104 S.Ct. at 1222. And, it is well to note that, in this case, Russell does not charge that Salve discriminated against her in respect to scholarship assistance or other financial aid.

The plaintiff, although mouthing the empty conclusion that the College's nursing curriculum is a "program or activity receiving Federal financial assistance" as required by 29 U.S.C. § 794, has failed to call the court's attention to any evidentiary fact which is capable of

bearing the weight of that averment.[5] The law is transparently clear: the Supreme Court has decided the point in *Grove City* and has since cited that opinion with approval in the context of the very statute at issue here. *See Consolidated Rail Corp v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984). *See also Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731, 741-42 (D.R.I.1984). Absent proof that federal funding or financial assistance of any kind was involved in the College's nursing program, Russell can mount no cause of action against these defendants under 29 U.S.C. § 794. That being so, the difficult issue of whether Russell's obesity can be considered to be an "impairment" (handicapping condition) within the meaning of 29 U.S.C. § 706(7)(B) need not be reached – and the court expresses no opinion thereon.[6]

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[5] The trivial amounts of money that Salve received to administer so-called Pell Grants and a cryptic reference in a musty document to a "Veterans Administration reporting fee" are at best de minimis. In no way can either of these items – which aggregated well under $3000 – be construed to "fund" the College's nursing program.

[6] In passing, it can be noted that a recent case from the Fourth Circuit provides an interesting perspective on the merits of Russell's discrimination claim. In *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir.1986), an acrophobic plaintiff's handicap claim under the Rehabilitation Act of 1973 was rejected where the plaintiff testified at deposition that his fear of heights had never limited his major life activities. *Id.* at 934. Sharon Russell has testified that she does not consider herself handicapped; indeed her claim that she is well equipped to function as a nurse is central to her count in contract. *See* Part IV, *post*. The absence of the requisite federal nexus in this case obviates the need to balance Russell's denial of her handicapped status against the College's insistence that she cannot perform

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The lack of any showing of the requisite federal subsidization necessitates the grant of *brevis* disposition in the defendants' favor on Count VII of the complaint.

IV. STATE LAW CLAIMS

Conceptually, the plaintiff's claims for wrongful discharge (Count V) and for the transgression of a theoretical (implied) covenant of good faith and fair dealing (Count II) are linked by common ties in the relevant caselaw. So, the court proposes to deal with these initiatives ensemble. The same sort of approach will be taken with respect to the claims for infliction of emotional distress – intentional (Count III) and negligent (Count VIII), respectively – which likewise lend themselves to collective scrutiny. The remaining two state law causes of action will be treated individually.

A. *Dismissal*

The plaintiff's remonstrance in Count V of the complaint, which apparently seeks to draw sustenance from an analogy to the employment relationship, postulates that even a collegian who has no contractual claim to a continuing place in the student body cannot be expelled without just cause. To be sure, some jurisdictions have

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adequately as a nurse because of her corpulence. The question of whether a person who has the pluck to deny her ostensible handicap may still come within the protection of the Rehabilitation Act because she is perceived by others as handicapped must be left for another day.

evidently created such an open-ended cause of action in favor of at-will employees who have been peremptorily dismissed from their jobs. As an ultimate matter, the plaintiff's claim teeters because of her failure to discover *any* case in *any* jurisdiction from which it might be inferred that such a cause of action (if it existed at all) can – or should – be extended to the university/student context. But in this case, there is no need to speculate upon such a far-reaching extension of the at-will employment doctrine – for the underlying doctrine itself simply does not occupy a place in Rhode Island law.

In the employer-employee environment, no less an authority than the Supreme Court of Rhode Island has recently spoken of the well-settled rule that "a promise to render personal services to another for an indefinite term is terminable at any time at the will of either party." *Rotondo v. Seaboard Foundry, Inc.*, 440 A.2d 751, 752 (R.I.1981). *See also Oken v. National Chain Co.*, 424 A.2d 234, 237 (R.I.1981). Put another way, an at-will employment relationship "creates no executory obligations." *Dudzik v. Lessona Corp.*, 473 A.2d 762, 766 (R.I.1984). This hornbook principle has twice been accepted as an accurate reflection of Rhode Island law by this federal district court. *Lopez v. Bulova Watch Co., Inc.*, 582 F.Supp. 755, 767 n. 19 (D.R.I.1984) (Selya, J.); *Brainard v. Imperial Manufacturing Co.*, 571 F.Supp. 37, 39 (D.R.I.1983) (Pettine, J.). So, by logical extrapolation, Count V stands upon too unsteady a legal footing to survive the instant summary judgment motion.

It would seem that this reasoning and collocation of the authorities writs "finis" as well to the charge contained in Count II of the complaint. After all, the claim that

the defendants have breached implied covenants of good faith and fair dealing in the course of terminating the relationship between Russell and the College relies largely on caselaw from other jurisdictions in the employer/employee context, and that authority is of no consequence in Rhode Island. *See ante.* Yet, the claimant responds, this count is sustainable by reference to the decision of the state supreme court in *AAA Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co.*, 121 R.I. 96, 395 A.2d 724 (R.I.1978).

The *AAA Pool* decision is, however, a fetid sinkhole for this plaintiff. In that case, the Rhode Island Supreme Court held that the supposed existence of an implied covenent of good faith and fair dealing did not give rise to any independent cause of action in the property insurance milieu. *Id.* at 726.[7] Although the *AAA Pool* tribunal affirmed the state supreme court's earlier recognition of a generalized duty of fair dealing in contractual relationships, espoused in *Ide Farm & Stable, Inc. v. Cardi*, 110 R.I. 735, 297 A.2d 6443, 645 (R.I. 1972), that generic duty was deemed inadequate to form the basis for an independent

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[7] Some state courts, including Rhode Island's, have created causes of action of this genre in the insurance context. *See, e.g., Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I.1980); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973). And, the *Bibeault* rule has been codified by statute. *See* R.I.Gen.Laws § 9-1-33. *Bibeault*, by its terms, opens no doors outside of the insurance industry. 417 A.2d at 318-19. Likewise, the statute has no application whatever beyond the insurer/insured relationship.

cause of action in tort in *AAA Pool*. It is similarly unavailing on the facts of the instant case.

A close look at *Ide Farm* is revealing. There, the state supreme court discerned "an implied covenent of good faith and fair dealing between parties to a (purchase and sale) contract *so that contractual objectives may be achieved.*" *Id.* at 645 (emphasis supplied). The plaintiff in *Ide Farm* sought only to recover the benefit of a bargain foregone when the defendant/buyer failed to meet obligations which had arisen under a purchase and sale agreement. *Id.* at 643. *Ide Farm* did no more than acknowledge the existence of an action in contract for expectation damages against a party who failed to use best efforts to fulfill a promise. Nothing in the case suggests (or condones) the creation of an independent cause of action sounding in tort for consequential damages. The sole thrust of the opinion is toward the achievement of contractual objectives, not toward the establishment of a separate cause of action for punitive or consequential damages for tortious bad faith. Accordingly, *Ide Farm* is barren soil for the present plaintiff.

As mentioned earlier, Rhode Island has consistently rejected the notion that, without more, an action lies in favor of an at-will employee for an unfair or bad faith breach of some covenant implied by law. *See Rotondo, supra; Oken, supra. See also Lopez, supra; Brainard, supra.* Where, as here, the plaintiff was a college student rather than an employee, there is even less reason to believe that the state courts would afford her a right of action of the type which she asserts in Count II of her complaint. In the absence of any respectable precedent from the courts of Rhode Island favorable to the plaintiff's stance, and in an

ambience where no court has intruded into the groves of Academe to reach so ambitious a result, this court cannot retailor state law to suit the plaintiff's specifications. After all, "[i]t is not for this court, sitting in diversity jurisdiction, to blaze a new trail where the footprints of the state courts point conspicuously in a contrary direction." *Plummer v. Abbott Laboratories*, 568 F.Supp. 920, 927 (D.R.I.1983).

There is, under Rhode Island law, no independently actionable covenent of good faith or fair dealing implicit in the university/student relationship. And, Russell has shown nothing which would enhance her case so as to extricate it from the operation of this general principle. The defendants' Rule 56 motion for summary judgment has merit insofar as it pertains to Count II, and must be granted.

B. *Emotional Distress*

Counts III and VIII of the plaintiff's complaint dwell in the realm of emotional distress, the former alleging intentional infliction and the latter claiming injury in consequence of the defendants' negligence.

The court need pause only briefly in its consideration of Count VIII. Rhode Island law controls in this diversity case; and the state supreme court, in *Champlin v. Washington Trust Co.*, 478 A.2d 985, 988 (R.I.1984), has expressly rejected the viability of any cause of action for negligent infliction of emotional distress fashioned along the lines set out in § 313 of the Restatement (Second) Torts. Rhode Island has been slow to expand the horizons of the (narrowly-defined) cause of action for negligent infliction of

emotional harm, *see Plummer v. Abbott Laboratories*, 568 F.Supp. at 922-27 (collecting cases), and Count VIII represents far too ambitious an initiative, given the current state of Rhode Island law. A federal court, of course, "must take state law as it exists: not as it might conceivably be, some day; nor even as it should be. . . . Plaintiffs who seek out a federal forum in a diversity action should anticipate no more." *Id.* at 927.

The early demise of Count VIII does not necessarily sound a death knell for Count III, as the claim asserted therein rests on a different legal footing. In attempting to invoke the standard of the Restatement (Second) Torts § 46, Count III tracks a path which is theoretically viable. Indeed, the state supreme court has heretofore recognized the existence of a cause of action patterned after § 46. *See Champlin*, 478 A.2d at 988.

The basic requisites of an intentional infliction claim are easily stated:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such body harms.

Restatement (Second) of Torts § 46 (19[illegible]

Before addressing any questions related to the conduct alleged and its supposed effects, the court must first determine whether the university/student relationship comprises the kind of soil in which the seeds of a § 46 claim for emotional harm may sprout. We start, again, with *Champlin*, which recognized a cause of action for intentional infliction of emotional distress in the debtor-

creditor context. *Id.* at 989. Any belief that *Champlin* might be limited to its own facts, or to the collection milieu, has been dispelled by the ensuing decision in *Elias v. Youngken*, 493 A.2d 158 (R.I.1985). *Elias* held that some rather unpleasant communications between an employee and his supervisor could, in theory, furnish the basis for a cause of action for intentional infliction of emotional distress (though the particular conduct alleged in *Elias* did not meet the rigorous standard of § 46). *Id.* at 163-64. The state supreme court again assumed the existence of this particular cause of action without inquiry into its jurisprudential antecedents or conceptual underpinnings, and considered only the "threshold of conduct," 493 A.2d at 164, at which liability might be imposed. *Id.* at 163-64. Though *Elias* is sparse of phrase, both its language and tenor buttress a broad reading and application of *Champlin*. By extending the potential reach of the tort to the supervisor/employee relationship, *Elias* enhances the (already bright) prospect of construing the scope of § 46 so as to embrace other (kindred) pairings.

The caselaw from other jurisdictions does not suggest any basis for insulating the university/student setting from the operation of the general rule. *See* Note, 38 A.L.R.4th 998, 1003-1030 (1985) (reviewing cases). Without reaching the question of whether Rhode Island would limit the bounds of this tort to some particular sets of relationships, this court is persuaded that the uniquely vulnerable nature of the student's standing in the world of the university places that pairing squarely within the category of relationships which, on any reasonable taxonymy, would give rise to a duty to avoid the intentional infliction of emotional harm.

Such a conclusion marks only the beginning of the odyssey. While *Elias* as *Champlin* together imply a cause of action for intentional infliction of emotional distress, generally applicable in the circumstances of this case, there are high hurdles along the road to success on such claims. First, the concept of what might be termed "intentionality" is required to do double duty in these precincts. The interdicted conduct itself must be "intentional," that is, purposeful, wilful, or wanton. What is more, the harm that results must also be "intentional," that is, it must have been intended or least recklessly caused.

The face side of the coin is undoubtedly legible in this case. The conduct which the defendants undertook was volitional; what was done, was done purposefully. Whether or not the defendants intended the consequences that ensued, the acts that they committed vis-a-vis Russell were, without exception, the products of forethought and the conscious exercise of free will.

The flip side of the § 46 coin is much harder to read. In the *Champlin* phrase, the challenged conduct "must be intentional or in reckless disregard of the probability of causing emotional distress." 478 A.2d at 989. The plaintiff does not argue that these defendants desired to cause her to suffer, or even that they knew such suffering was substantially certain to follow from their course of conduct. Rather, Russell contends that the concept of recklessness is subsumed within the concept of intentionality for these purposes. Prosser and Keeton weigh in on plaintiff's side of this issue:

> [L]iability for extreme outrage is broader [than a literal interpretation of intentionality would allow] and extends to situations in which there is

> no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is called wilful or wanton, or reckless.

Prosser and Keeton, *The Law of Torts* (5th ed. 1984) § 12 at 64 (discussing the requirement of extreme outrage).

There are four elements which must coincide under Rhode Island law to impose liability on such a theory:

> (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.

Champlin, 478 A.2d at 989.

Points (3) and (4) are of only passing interest at this juncture. The plaintiff has testified that she suffered nightmares, sleeplessness, nausea, vomiting, diarrhea, gastric upset, and hypoglycemic attacks in the wake of the defendants' conduct. There is ample evidence in the record to withstand Rule 56 scrutiny on the last two prongs of the *Champlin* test. And, the first two prongs can, for the purposes at hand, be viewed as susceptible to measurement by a merged yardstick: reckless disregard *cum* outrageousness. The question becomes whether or not Russell has proffered enough in the way of proof to create a genuine issue of material fact as to this criterion.

The combined standard is a stringent one. The oft-cited comment (d) to § 46 of the Restatement (Second) of Torts (1965) provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Whether the conduct of a given defendant surpasses the bounds of decency is a function of three factors: (i) the conduct itself, (ii) in light of the particular relationship of the parties, (iii) having in mind the known (or knowable) susceptibility of the aggrieved party to emotional injury. These can best be assayed, in this case, in the inverse order of their appearance. Russell was a known quantity. Despite her evident sensitivity to weight-related emotional trauma, and her documented history of precarious emotional balance and tenuous self-esteem, the individual defendants – well-educated professionals all – plowed ahead. Given the full panoply of the circumstances, the proposition that they acted in reckless disregard of the probability that an obese youngster's psychic equilibrium could easily be knocked askew seems fairly debatable. This conclusion is fortified by a glimpse of the middle factor. The student stands in a particularly vulnerable relationship vis-a-vis the university, the administration, and the faculty. She is away from home,

subject to the authority and discipline of the institution, and under enormous pressure to succeed. The relationship of these parties was such that the defendants could fairly be expected to have acted maturely – and even with some tenderness and solicitude – toward the plaintiff.

Seen in this context, the defendants' conduct, as the plaintiff has portrayed it, cannot be said as a matter of law to stumble on the threshold of outrageousness. To be sure, the law does not shield a person from words or deeds which are merely inconsiderate, insulting, unflattering, or unkind. The courts possess no roving writ which warrants intervention whenever someone's feelings are hurt or someone has been subjected to a series of petty indignities. And, there must be room for some lack of courtesy and finesse in interpersonal relations. In *Champlin*, for example, the state court ultimately declined to impose liability because of the need to afford a creditor "reasonable latitude in the manner in which it seeks to collect overdue notes, even though there may be times when these methods might cause some inconvenience or embarrassment to the debtor." *Champlin*, 478 A.2d at 989-90.

Yet, the behavior challenged here, viewed in the light most favorable to the plaintiff's case, seems to be shaped of sterner stuff. Although a private college must be afforded wide discretion in enforcing its scholastic standards and in disciplining its students, there is no justification for debasement, harassment, or humiliation. The academic mise en scene, in any reasoned view, is considerably more civilized than the debtor-creditor environment, and there is correspondingly less play for

roughness.[8] Given the trust implicit in the student's selection of a college, and the peculiar vulnerability of undergraduates, the facts set forth by the plaintiff, if ultimately proven, comprise a scenario which is far more conscience-provoking than the *Champlin* counterpart. The indignities which Russell asserts have been practiced on her are arguably offensive in the extreme, perhaps repugnant to the norms which one would expect to flourish in the academic world. Taken from the plaintiff's coign of vantage, the behavior in question, if it is shown to be as obnoxious as the plaintiff in her Rule 56 opposition suggests, might well be thought by a properly-instructed jury to be so atrocious as to be actionable. As a general matter, the plaintiff appears to have raised sufficient doubt as to the quality of the defendants' actions to blunt the summary judgment ax. *See Cortes Quinones v. Jimenez Nettleship*, 773 F.2d 10, 15 (1st Cir.1985) (per curiam) (summary judgment inappropriate where the parties "have raised sufficient unanswered questions to require [the] case to go forward with more complete development of the facts.").[9]

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[8] The relationship among students – as opposed to that between the institution and the student body – is a different kettle of fish, not on today's menu.

[9] In pressing their motion for summary judgment as to Count III, the defendants have painted with the broadest imaginable stroke. Their asserted position is that Russell has not made out a claim against *any* defendant. The court has now held to the contrary. *See* text *ante*. The next logical question – whether, given the overall viability of the claim, any one or more of the defendants nevertheless deserves immunity because of the absence of evidence of individual culpability – has

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C. *Right to Privacy*

Count IV of the complaint posits a supposed invasion of Russell's privacy. No such cause of action was recognized at common law in Rhode Island. *See Champlin*, 478 A.2d 988 n. 2. The General Assembly, however, filled this perceived void in 1980 by the enactment of a statute which is now codified at R.I.Gen.Laws § 9-1-28.1 (1985 Reenactment) (Privacy Act). The Privacy Act,[10] which

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not been addressed by the movants, and the court will not gratuitously fill the void. *Cf. Blue Cross of Rhode Island v. Cannon*, 589 F.Supp. 1483, 1494 n. 15 (D.R.I.1984) (though motion to dismiss a single count of a complaint has been granted on a ground which probably undercuts certain other counts as well, court will not act sua sponte, but will await the filing of properly-focused motions). Thus, it is not necessary at this juncture to scan the record so as to assess each defendant's contribution (or lack thereof) to the miseries which Russell laments.

[10] The Privacy Act declares in pertinent part:

> (a) Right to Privacy Created. – It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
>
> (1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) It was an invasion of something that is entitled to be private or would be expected to be private;
>
> (ii) Such invasion was or is offensive or objectionable to a reasonable man; although,

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established a "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion," *Id.* at § 9-1-28.1(a)(1), must necessarily inform this court's determination of the motion sub judice insofar as the fourth count of the complaint is concerned.

The court treads on near-virgin ground in venturing to interpret this neoteric statutory right. The state

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> (B) The person who discloses such information need not benefit from such disclosure.
>
> • • •
>
> (3) The right to be secure from unreasonable publicity given to one's private life;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) There has been some publication of a private fact;
>
> (ii) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
>
> • • •
>
> (B) The fact which has been disclosed need not be of any benefit to the discloser of such fact.
>
> (b) Right of Action. – Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress. . . .

R.I.Gen.Laws § 9-1-28.1(a)(b) (1985 Reenactment).

supreme court, in a rather cryptic footnote in *Champlin*, 478 A.2d at 988 n. 2, wrote that Ms. Champlin's claim for invasion of privacy was moot because to "establish[ ] a violation of her right of privacy, [the plaintiff] would have had to satisfy the requirements of § 46" of the Restatement (Second) of Torts (1965). On the facts of *Champlin*, the court seemed to say, the cause of action at common law for intentional infliction of emotional distress merged, as a practical matter, with the statutory claim for invasion of privacy. In support of this proposition, the *Champlin* court cited *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 820, 529 P.2d 104, 110 (1974). To be sure, *Dawson* – which, like *Champlin*, was a debtor-creditor case – did treat the two causes of action interchangeably and held that the stringent standard of liability for intentional infliction of psychic harm should govern the merged claims. In so doing, however, the Kansas Supreme Court relied heavily on the nature of debtor-creditor intercourse:

> When one accepts credit, the debtor impliedly consents for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy. . . . [D]ebtors' tender sensibilities are protected only from appressive, outrageous conduct.

Id. at 820-21, 529 P.2d at 110.

The *Dawson* court made it clear that the right of privacy is normally governed by the more relaxed standard of liability that requires a finding of conduct "highly offensive to a reasonable man." *Id.* at 822, 529 P.2d at 111. By its allusion to *Dawson* in the *Champlin* footnote, therefore, it would seem that the Rhode Island Supreme Court

placed a Restatement § 46 gloss on rights afforded by the Privacy Act only in the (predictably) rough-and-ready precincts in which the relationship of debtor and creditor holds sway. *See McMenamin v. Bishops*, 6 Wash.App. 455, 493 P.2d 1016 (1972); *Lewis v. Physicians, Etc. Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947); *Norris v. Maskin Stores, Inc.*, 272 Ala. 174, 132 So.2d 321 (1961). Yet, the case at bar arises in a far different – and more urbane – sort of institutional context, one which conduces toward reading R.I.Gen.Laws § 9-1-28.1(a)(1) exactly as it was written, thereby providing a remedy for "unreasonable intrusion upon one's physical solitude or seclusion (that). . . . was or is offensive or objectionable to a reasonable man." *Id.* The relationship is such that Russell could reasonably have expected to be granted a considerable degree of privacy as to intimate, personal matters. Thus, a literal reading of the Privacy Act reaches the perimeter of this claim. The court so holds.

Once it has been determined that Count IV states an actionable claim, the record reflects the presence of facts adequate to preclude summary judgment. Section 9-1-28.1(a)(1) does not speak in terms of the "publication" of a private fact, but rather in terms of "an invasion of something that is entitled to be private or would be expected to be private." *See ante* n. 10. To be sure, there was nothing private or confidential about Russell's corpulence (it was there to be seen at the most casual glance), so drawing attention to her girth would not, in and of itself, be actionable as an invasion of privacy under Rhode Island law. Yet, there was considerably more here: the continual inquiry into the progress of the plaintiff's diet, the scrutiny of her personal weight loss

records, the exaggerated interest in what forbidden morsels Russell ingested, and the preoccupation with her perceived lack of self-discipline, to name but a few variations on the intrusive theme which the defendants played. These provocations coalesce to fit comfortably within the species of conduct which a trier of fact could reasonably find offensive or objectionable. And, this is especially true inasmuch as few things are more personal or private to a young, single person than weight and one's efforts to control it. Accordingly, the Rule 56 motion misfires as to this statement of claim.[11]

D. *Implied Contract*

The final issue to be addressed is the contract claim asserted in Count I.[12] It is accepted law that the relationship between student and university is contractual in nature. *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir.1984); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir.1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). Concededly, the specific character of this sort of contractual relationship is somewhat amorphous. The contract is " 'not an integrated agreement, the

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[11] This is not to say that there is, on this record, a jury question as to whether *all* of the defendants invaded the plaintiff's privacy; it is merely to note the existence of evidence that *one or more* of the defendants may have done so. That being so, and the movants having eschewed any individualized attacks on the sufficiency of the proof, the court need go no further. *See ante* n. 9.

[12] Count I is asserted against the College alone, *see* Complaint ¶19(c); thus, Salve is the only movant in this wise.

standard is that of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Id.* at 202, quoting *Giles v. Harvard University*, 428 F.Supp. 603, 605 (D.D.C.1977); *accord Cloud v. Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir.1983). *See also Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir.) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category"), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 131 (1975); *Napolitano v. Princeton Univ. Trustees*, 186 N.J. Super. 548, 453 A.2d 263, 272-73 (1982) (university/student relationship cannot be described either in purely contractual or associational terms).

If a contract existed, it came into being when Russell matriculated at Salve, and she and the College, as the contracting parties, would be the real parties in interest. The nisi prius roll shows clearly that no express agreement embodied the kind of terms which the plaintiff alleges permeated the relationship. Thus, the court must ascertain whether the implied agreement between the College and its (former) pupil arguably extended far enough to support Russell's present litigation. Upon close perscrutation, the court finds that the disputed facts surrounding the terms of the "contract" provide sufficient grist to warrant turning the mill of jury deliberation. The record is not so clear as to entitle Salve to summary judgment on Count I at this stage of the proceedings.

Salve formulates a variety of positions in its search to justify *brevis* disposition of the flagship count of the plaintiff's complaint. In the first place, the institutional

defendant asseverates that the scales of "reasonable expectation" should be tipped by the provisions of the Handbook, a pamphlet which admittedly affirms the important parallel between a nursing student's health status and the health of the patients whom the nurse hopes to serve. The Handbook requires each student to inform the clinical coordinator of particular health problems; indeed, nursing students must sign a form for the clinical placement program each semester that vouchsafes full disclosure of all medical abnormalities. And, the Handbook reserves to the coordinator discretion to determine whether a student's participation in the clinical program is contraindicated form signed by all students states: "I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the Clinical Area." The College has an obvious interest in ensuring that a student poses no health risk to herself or others as she proceeds into a clinical placement. But, howsoever rational the College's generalized requirements might be, the application of those requirements in Russell's case is another matter.

Contagion was not legitimately at issue – after all, there is no allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own well-being.

The only possible bases for prohibiting the plaintiff from clinical training were either (i) that her obesity would impede satisfactory performance of her duties, or (ii) that her appearance would be a poor example for patients.

The college cannot plausibly argue, however, that Russell was bound unconditionally to accept the decision to exclude her from further participation in the clinical placement program, regardless of how arbitrary or irrational that decision might have been. As a matter of Rhode Island law, "[t]here is no doubt that ordinarily if one exacts a promise from another to perform an act the law implies a counter promise against arbitrary or unreasonable conduct on the part of the promisee." *Psaty & Fuhrman v. Housing Authority*, 68 A.2d 32, 35 (R.I.1949). And, at the very least, the reasonableness of either of the possible lines of thought limned above is open to serious question.[13]

In the circumstances at bar, there are competing inferences which can be drawn. There is evidence which, if credited, tends to show that Russell's girth did not reduce her proficiency. The argument that her overweight condition was deleterious to patients as a matter of example rests, at this point, on sheer speculation. Accordingly, the

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[13] To the extent that the printed form which Russell completed (under which the clinical coordinator's decision is classified as "final") is material to this issue, the document must be construed strictly, with all doubts resolved against Salve (as the originator of the form). This is true under Rhode Island law, *see Fryzel v. Domestic Credit Corp.*, 385 A.2d 663, 666-67 (R.I.1978); *A.C. Beals Co. v. Rhode Island Hospital*, 292 A.2d 865, 872 (R.I.1972); *Zifcak v. Monroe*, 249 A.2d 893, 896 (R.I.1969), and as a matter of interscholastic jurisprudence, *see, e.g., Corso v. Creighton University*, 731 F.2d at 533 (in university-student relationship where "contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party").

decision to expel Russell, insofar as it prescinds from the Handbook, must be tried to determine whether it was the product of reason or caprice. Summary judgment would be an inappropriate means of resolving the conflict.

The second morsel in Salve's Count I cupboard is equally unavailing. In a nutshell, the College argues that Russell failed one of the courses prerequisite to completion of her nursing degree, thereby justifying her dismissal and eliminating the need for further inquiry. Yet, there is evidence that the instructor admitted that all of Russell's deficiencies in this course were "directly related" to the claimant's obesity. On this record, a genuine question exists as to whether adiposis was, in Russell's case, a legitimate impediment to due fulfillment of the clinical requirements of the nursing program (as Salve maintains), or whether the College's evaluation was tainted by an unreasonable aversion to obesity or by a desire to expel Russell because she did not conform to the "Salve image."

There is considerable evidence in the record attesting to the plaintiff's competence as a student and as a nurse, notwithstanding her one negative evaluation by the defendant Lavin. On August 20, 1985, just one day before Chapdelaine's billet-doux was authored, the plaintiff's supervisor at Hartford Hospital, Patricia Reilly, wrote that she "looked and acted in a very professional manner. Her attendance was excellent and her performance very good. I would be most pleased to hire her as a professional nurse. In fact, I expect to be able to offer her a position for June of 1986." After her dismissal from the College, Russell was promptly admitted to the nursing program at

St. Joseph's College (also operated by the Sisters of Mercy). she completed the program there without incident.

While the court is sensitive to the importance of academic freedom and recognizes that deference must be accorded to the reasonable judgment of responsible College officials, the question of reasonableness is in too precarious a balance here to permit summary disposition. Faced with contrary opinions from qualified health care professionals and particularized allegations of personal animosity born of obesophobic obsession, this issue, viewed in the manner most hospitable to the plaintiff's case, survives Fed.R.Civ.P. 56 scrutiny.

The same sort of reasoning applies to the claim that Russell, having signed a document which pledged a weight loss of two pounds per week as a condition of continuing her studies in the College's nursing department, *see* Appendix, was open to ouster for her failure to abide by her written promise. (After all, the Contract itself provided that a failure to achieve the stated goal would result in "voluntary and immediate withdrawal from the nursing program at Salve Regina College.") But, though it is beyond dispute that the plaintiff did not shed the required poundage, issues of material fact exist as to duress, coercion, and her state of mind, generally, upon the execution of the document. Moreover, as the plaintiff notes, there was no readily ascertainable consideration for her promise. If certain (arguably plausible) inferences are drawn in the manner least favorable to the movant, the weight loss covenant can be seen not as an avenue of defense, but as a product of the invidiously discriminatory course of conduct which the defendants displayed in

Russell's case. Finally, the oxymoronic concept of a student essaying a "voluntary withdrawal" against her will, *cf. Chang v. University of Rhode Island*, 606 F.Supp. 1161, 1237 (D.R.I.1985), itself stirs doubts.

In sum, the Contract is at best a useful piece of evidence to assist in constructing the jigsaw of contractual terms, and at worst a piece of paper which is meaningless except as proof of the defendants' malevolence. In any event, it is not dispositive, as a matter of law, of the merits of Count I. It is impossible to apply the standard of "reasonable expectation," *Lyons*, 565 F.2d at 202, to Russell's situation without the aid of precisely the sort of factfinding which battens the Rule 56 hatch. Inasmuch as the viability of Russell's breach of contract claim will depend on the resolution of questions of disputed fact, *brevis* disposition must be withheld on this count.

V. CONCLUSION

The problems presented by this lawsuit are weighty in every sense of the word. The case emphasizes the uncertain configuration of the boundaries which surround important, but markedly different, values: the necessarily broad freedom which academic administrators must possess in order to operate institutions or higher learning, the rights of a student of tender years to be sheltered from gratuitous debasement or intrusiveness (or worse, from malicious conduct which offends fundamental notions of human decency), the standards of behavior which a university and an undergraduate can reasonably expect from each other. At this relatively early

stage of the instant litigation, it remains somewhat unclear as to precisely where on this dimly-lit terrain the College's conduct vis-a-vis Russell falls. So, the illumination of further factfinding seems essential in order to clarify certain of the issues and to map the rights and liabilities of the parties more exactly.

In summary, the court holds that the defendants, and each and all of them, have demonstrated an entitlement to summary judgment in their favor on Counts II, V, VI, VII, and VIII of the complaint. There are, as to these initiatives, no genuine questions of material fact. For the reasons stated, the defendants deserve to prevail thereon as a matter of law. Conversely, the motion for summary judgment must be denied as to Counts I, III, and IV of the complaint. Russell has shown enough steel to put the defendants (or some of them, *see ante* nn. 9, 11) to their mettle on these claims.

The motion for summary judgment is *granted in part and denied in part*, as outlined above. As to those counts upon which the defendants have prevailed, entry of final judgment shall be withheld pending disposition of the remaining claims. Fed. R. Civ.P. 54(b). *See Bank of New York v. Hoyt*, 108 F.R.D. 184, 186-87 (D.R.I.1985).

It is so ordered.

APPENDIX

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of

these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.

2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25, 1985.

   NB – Report January 22nd for first accounting after the holiday.

3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russel
Sharon Russell
Dec. 18, 1984
Date
/s/ Catherine E. Graziano, RN
Witness